

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 SUMMARY ORDER
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6 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER
7 AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY
8 OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY
9 OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR
10 IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.
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12 At a stated term of the United States Court of Appeals for the Second Circuit, held at the
13 Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 9th
14 day of August, two thousand and six.
15

16 PRESENT:

17 HON. JON O. NEWMAN,
18 HON. CHESTER J. STRAUB,
19 HON. ROBERT A. KATZMANN,
20 *Circuit Judges.*
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23 Xing Yun Lin,

24 *Petitioner,*

25
26 v.

No. 05-1227-ag
NAC

27
28 United States Department of Justice, Attorney General &
29 Immigration and Naturalization Service,
30 *Respondents.*
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34 FOR PETITIONER: Xing Yun Lin, *pro se*, New York, New York.
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36 FOR RESPONDENTS: Colm F. Connolly, United States Attorney, Seth M. Beausang,
37 Assistant United States Attorney, Wilmington, Delaware.
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39 UPON DUE CONSIDERATION of this petition for review of a decision of the Board of
40 Immigration Appeals (“BIA”), it is hereby ORDERED, ADJUDGED, AND DECREED, that the
41 petition for review is GRANTED, the BIA’s DECISION is VACATED, and the case is
42 REMANDED to the BIA.

1 Xing Yun Lin, (A95-918-601), *pro se*, petitions for review of the BIA decision affirming
2 Immigration Judge (“IJ”) Patricia A. Rohan’s September 9, 2003 decision denying Lin’s
3 application for asylum, withholding of removal, and relief under the Convention Against Torture
4 (“CAT”). We assume the parties’ familiarity with the underlying facts and procedural history of
5 the case.

6 Where, as here, the BIA summarily affirms the decision of the IJ without issuing an
7 opinion, *see* 8 C.F.R. § 1003.1(e)(4), we review the IJ’s decision as the final agency
8 determination. *See, e.g., Twum v. INS*, 411 F.3d 54, 58 (2d Cir. 2005). We review the agency’s
9 factual findings, including adverse credibility determinations, under the substantial evidence
10 standard, treating them as “conclusive unless any reasonable adjudicator would be compelled to
11 conclude to the contrary.” 8 U.S.C. § 1252(b)(4)(B); *see, e.g., Zhou Yun Zhang v. INS*, 386 F.3d
12 66, 73 & n.7 (2d Cir. 2004). However, we will vacate and remand for new findings if the
13 agency’s reasoning or its fact-finding process was sufficiently flawed. *Cao He Lin v. U.S. Dep’t*
14 *of Justice*, 428 F.3d 395, 406 (2d Cir. 2005); *cf. Xiao Ji Chen v. U.S. Dep’t of Justice*, 434 F.3d
15 144, 158 (2d Cir. 2006).

16 The IJ’s observation that Lin did not testify spontaneously was an appropriate factor for
17 her adverse credibility finding, as this Court gives particular deference to credibility
18 determinations that are based, like this one, on the adjudicator’s observation of the applicant’s
19 demeanor. *See Zhou Yun Zhang*, 386 F.3d at 73. The IJ was reasonable also in rejecting Lin’s
20 explanation for her discrepant testimony regarding the date of her parents’ arrest, and
21 appropriately relied on it as a factor in her adverse credibility finding, as a reasonable adjudicator
22 would not be compelled to accept Lin’s explanation that she was confused. *Cf. Majidi v.*

1 *Gonzales*, 430 F.3d 77, 81 (2d Cir. 2005).

2 However, the IJ mischaracterized the record in noting a discrepancy in Lin's testimony
3 regarding when she was arrested by Chinese authorities on account of her affiliation with the
4 Falun Gong movement. Lin's first mention of the arrest did not specify the time, and she then
5 specifically clarified that she was not arrested immediately, but rather two days after the
6 detention center officials notified village authorities of her alleged affiliation with Falun Gong.
7 Lin's testimony regarding the timing of her arrest was thus internally consistent, and the IJ was
8 unreasonable in using the nonexistent discrepancy as a factor in her adverse credibility
9 determination. Although the IJ was understandably concerned that the petitioner's inconsistency
10 as to the year in which her parents were arrested created an inconsistency as to when she herself
11 was arrested, the mischaracterization of the record as to the alleged "two day" discrepancy may
12 have unreasonably affected the IJ's credibility finding. Additionally, the IJ unreasonably took the
13 petitioner's answer that she was hit with the electric rod "in her chest" as not responsive to the
14 question of where she was hit. Further, because the IJ did not "probe for incidental details," she
15 failed to properly create a record sufficient to support her finding that Lin did not provide
16 sufficient details regarding her claim that she practiced Falun Gong in the United States. *Jin Shui*
17 *Qiu v. Ashcroft*, 329 F.3d 140, 152 (2d Cir. 2003); *Jin Chen v. U.S. Dep't of Justice*, 426 F.3d
18 104, 114 (2d Cir. 2005).

19 Because three of the five factors used by the IJ to support her adverse credibility finding
20 are erroneous, we cannot confidently predict that she would have reached the same conclusion
21 based solely on Lin's demeanor and her inconsistent testimony regarding the date of her parents'
22 arrest. *Xiao Ji Chen*, 434 F.3d at 161. Because the IJ' adverse credibility determination is not

1 supported by the record, remand is necessary for further determination on Lin's claims for
2 asylum, withholding of removal, and relief under the CAT.

3 _____For the foregoing reasons, the petition for review is GRANTED, the BIA's decision is
4 VACATED, and the case is REMANDED to the BIA for further proceedings consistent with this
5 order. The stay of removal previously granted in this petition is VACATED.
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8 FOR THE COURT:
9 Roseann B. MacKechnie, Clerk
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13 By:_____